No. 89-419

IN THE

Supreme Court of the United States

KEITH A. JOHNSON,

Petitioner,

v.

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MINNESOTA

Brief In Opposition To Petition For Writ Of Certiorari

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QUESTIONS PRESENTED

1. Are railroad employees whose injuries are covered by the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, precluded from bringing an action under the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.?*

2. Is an employee who repairs or maintains equipment used for ship loading engaged in "maritime employment" within the meaning of U.S.C. § 902(3)?

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PARTIES TO THE PROCEEDING

The parties to the proceeding in the Minnesota Court of Appeals are indicated on the caption. Transtar, Inc. is the parent company of Respondent. Respondent has no subsidiaries. Its affiliates are as followers: Bessemer and Lake Erie Railroad Company; Birmingham Southern Railroad Company; Central Radio Telegraph Company; Cuyahoga Dock, Inc.; Elgin, Joliet & Eastern Railway Company; Fairfield Southern Company, Inc.; The Lake Terminal Railroad Company; McKeesport Connecting Railroad Company; Mobile River Terminal Company, Inc.; Mon Valley Railway Company; Pittsburgh & Conneaut Dock Company; Tracks Traffic and Management

Services Company; Union Railroad Company; USS Great Lakes Fleet, Inc.; and Warrior & Gulf Company.

The following companies hold the voting shares of Respondent's parent company, Transtar, Inc.: USX Corporation; Blackstone Capital Partners, L.P. and Blackstone Transportation Partners.

OPINION BELOW

Johnson v. Duluth, Missabe and Iron Range Railway Company, 437 N.W.2d 727 (Minn. App. 1989), *review denied* May 24, 1989. The Order of the Minnesota Supreme Court denying review (A17), and the Decision of the trial court (A1-A7) were not reported.

JURISDICTION

The Minnesota Supreme Court denied further review of this case on May 24, 1989 (A17). Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1257(3), and filed his original Petition for Certiorari on August 18, 1989. The Clerk refused to docket the Petition because of its failure to comply with the Supreme Court rules and a corrected Petition was mailed to attorneys for Respondent on September 6, 1989, and was received on September 8, 1989.

STATUTES INVOLVED

1. The Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*

2. Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.*

STATEMENT OF THE CASE

Petitioner claims that he was injured while working for Respondent as a bridge and building mechanic at its ship-

loading and storage facility (A3). Respondent transports iron ore from the Minnesota Iron Range to the facility which is located adjacent to Lake Superior (A11). Railroad cars are unloaded at the facility's train unloading station (*Id.*) A conveyor system then moves the ore pellets directly to the dock for loading into the holds of vessels or to a storage area (A11-A12). Petitioner claims to have been injured while repairing a dust collecting bag house at the train unloading station (A12). His duties included performing repairs and maintenance to the several bag houses located on the facility, walking the conveyor system looking for defective rollers, and occasionally helping to replace the rollers on the conveyor system (A12).

Petitioner brought an action against Respondent seeking to recover for his injuries under the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.* (hereinafter "FELA"). The trial court granted Respondent's Motion for Summary Judgment, finding as a matter of law that the Petitioner was engaged in "maritime employment" within the meaning of 33 U.S.C. § 902(3) and that the exclusive remedy for the damages sought in the action was under the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (hereinafter "LHWCA") (A1-A5). The Minnesota Court of Appeals affirmed the trial court, *Johnson v. Duluth, Missabe and Iron Range Railway Company*, 437 N.W.2d 727 (Minn. App. 1989), and the Minnesota Supreme Court denied further review (A17).

SUMMARY OF ARGUMENT

If the LHWCA provides a remedy for a railroad employee's on-the-job injury, the employee cannot maintain an action under FELA. The legislative history of the LHWCA demonstrates that Congress intended that where railroad workers were provided a remedy under the LHWCA for on-the-job injuries, such workers should be precluded from maintaining an FELA action. As originally introduced, the bill specifically excluded railroad employees from its coverage, but that exclusion was eliminated when the bill was finally passed. In 1972, coverage under the LHWCA was expanded by extending coverage to certain areas adjoining the navigable waters. Despite the decisions of this Court dating back to 1930, Congress failed to include any provision excluding railroad employees from coverage under the Act. Although the lower courts consistently applied the expanded Act to railroad workers engaged in maritime employment in the specified areas adjoining the navigable waters of the United States after 1972, Congress again failed to exclude railroad workers when the Act was substantially amended in 1984. By eliminating an exclusion for railroad workers in the original Act and subsequently failing to insert such an exclusion in amendments specifically dealing with the jurisdictional issue, Congress has demonstrated its intent to include railroad workers engaged in maritime employment within the LHWCA and preclude them from bringing an FELA action.

Public policy supports the conclusion that railroad workers injured on the job while engaged in maritime employment should be covered under the LHWCA and precluded from bringing an FELA action. The LHWCA embodies

the principles of a modern workers' compensation system, while the FELA limits liability to situations where the employer is at fault. As a remedial act typical of modern workers' compensation statutes, the LHWCA is liberally construed in favor of coverage. In exchange for liability without regard to fault, benefits are limited to a statutory schedule and the employer's liability under the Act is exclusive. Thus, the public policy which supports the exclusive remedy provision contained in the LHWCA requires that employees who are covered under the LHWCA be precluded from maintaining an action under FELA.

Workers who repair and maintain equipment necessary for loading ships are engaged in maritime employment within the meaning of the LHWCA. The recognition that modern cargo-handling techniques have moved the work of many maritime employees landward was a principal purpose in extending coverage of the Act in 1972. Consistent with this remedial purpose, the term "maritime employment" must be construed to include those who repair and maintain equipment necessary to shiploading.

ARGUMENT

I.

EMPLOYEES WHOSE INJURIES ARE COVERED BY THE LHWCA CANNOT MAINTAIN AN FELA ACTION.

A. The Legislative History Of The Longshoremen and Harbor Workers' Compensation Act Demonstrates That Congress Intended It To Provide The Exclusive Remedy For Railroad Workers Whose Injuries Are Covered By The Act.

In *Southern Pacific Co. v. Jenson*, 244 U.S. 205 (1916), this Court held that neither the state workers' compensa-

tion statute nor the Federal Employers Liability Act applied to a railroad employee injured while loading a vessel. The state statute was held inapplicable because the matter fell exclusively within federal admiralty jurisdiction. An attempt to remedy maritime accidents under state workers' compensation laws was held unconstitutional in *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1923). When the bill which became the Longshoremen and Harbor Workers' Compensation Act in 1927 was pending in Congress,

> . . . The importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees without regard to the fault of the employer, were distinctly recognized.

Noguieria v. New York, New Haven, Hartford R.R. Co., 281 U.S. 128, 136 (1930).

As originally passed by the Senate, the bill which became the LHWCA contained a provision excluding railroad employees injured while engaged in interstate or foreign commerce. Sen. Rep. No. 973 (69th Cong. — 1st Sess.). This exception was eliminated from the bill when finally passed. (*Id.*)

Relying on the elimination of the exclusion, the presence of other, specific exclusions, and the importance of the policy of providing compensation for on-the-job injuries without regard to the fault of the employer, this Court held in *Noguieria, supra,* that the LHWCA provided the exclusive remedy for a railroad worker injured on navigable waters of the United States.

In 1972, the LHWCA was significantly amended for

the first time since 1927. Prior to 1972, the LHWCA applied to injuries occurring on the navigable waters of the United States so long as the employer and employees engaged in maritime employment. *Pennsylvania R.R. Co. v. O'Rourke,* 344 U.S. 334 (1952). Persons injured on piers or in terminals adjoining the navigable waters were not covered by the Act and frequently were without any workers' compensation remedy. *Davis v. Department of Labor,* 317 U.S. 249 (1942).

Recognizing that many state workers' compensation acts provided inadequate amounts of compensation and that modern cargo handling techniques had moved the work of many maritime employees landward from the water's edge, coverage under the Act was substantially expanded. *See generally, Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 262-263. The term "navigable waters" was expanded to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area customarily used by an employer in loading, unloading or repairing a vessel." 33 U.S.C. § 903A. To narrow the class of persons within this expanded area who were entitled to benefits under the LHWCA, Congress restricted the definition of "employee" to "any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operation and any harbor worker, including a ship repairman, ship builder and ship breaker . . . ." 33 U.S.C. § 902(3).

After the expansion of the LHWCA's coverage in 1972, the lower federal courts have consistently held that railroad workers injured in the specified areas adjoining the navigable waters are precluded from bringing an FELA

action if they are engaged in maritime employment within the meaning of the LHWCA. *Price v. Norfolk & W. Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980); *Harmon v. Baltimore & Ohio R. Co.*, 560 F.Supp. 914 (1983), *aff'd.* 741 F.2d 1398 (D.C. Cir. 1984); *Vogelsang v. Western Maryland Ry. Co.*, 531 F.Supp. 11, *aff'd.* 670 F.2d 1347 (4th Cir. 1982).

Congress again amended the LHWCA in 1984. 98 Stat. 1639-1655, P.L. 98-426 (98th Con. — 2nd Sess.). Although a number of amendments were added to exclude certain types of employees from the definition of "employees engaged in maritime employment" contained in Section 902(3), no exclusion was enacted for railroad employees or for workers engaged in the repair or maintenance of shiploading equipment. *Id.*, § 2. According to the House Report, except for the exceptions specifically enacted, case law regarding coverage under the Act was to remain undisturbed:

> The Committee underscores that the exclusions from the definition of "employee" contained in the amendments to section 2(3) of the Act and the amendments to section 3 of the Act (discussed below) are intended to be narrowly construed. Except as specifically detailed in those amendments, it is the intention of the committee neither to expand nor to contract the current coverage of the Longshore Act. This Committee concurs with the view of the Senate Committee on Labor and Human Resources in this regard which stated "with the Committee making only limited changes to (these sections) of the Act, it is obvious that a large body of decisional law relative to traditional maritime employers and harbor workers remains undisturbed." (Senate Committee on Education

and Labor, Report to Accompany S38, Report No. 98-81, 98th Congress, 1st Session, page 26.)

House Report No. 98-570, Part 1, p. 5, 98th Cong. — 2nd Sess.

Congress cannot be presumed to have been unfamiliar with this Court's decisions in *Noguieria* and *O'Rourke* when it enacted the 1972 amendments substantially expanding coverage under the Act. Nor can it be presumed to have been unaware in 1984 of the Court of Appeals' decisions precluding an FELA action for railroad workers injured on land while engaged in maritime employment. When viewed against the back drop of these decisions, the failure of Congress to specifically exclude railroad workers from the Act while enacting amendments dealing with coverage under the Act sufficiently indicates the congressional intent that railroad workers who are injured while engaged in maritime employment within the meaning of the LHWCA are precluded from maintaining actions under FELA.

B. Public Policy Requires That Employees Whose Injuries Are Covered Under The LHWCA Be Precluded From Maintaining An FELA Action.

The LHWCA has all the characteristics of a modern workers' compensation system. The employee has a right of recovery which is impaired by neither the employee's contributory negligence nor the employer's lack of fault, if the employee's injury or disease arises out of and in the course of employment. U.S.C. § 903(a); 33 U.S.C. § 902. In exchange for compensation without regard to fault. the employee gives up the right to sue his employer in tort.

and the employer is assured of a fixed, exclusive liability in exchange. 33 U.S.C. § 905; 33 U.S.C. § 908; *see generally, Baker v. Pacific Far East Lines, Inc.*, 451 F.Supp. 84 (89-90) (N.D.Cal. 1978).

As with virtually all workers' compensation acts providing similar, reciprocal benefits for employer and employee, the Act provides that "the liability of an employer (under the Act) shall be exclusive and in place of all other liability of such employer to employee . . ." 33 U.S.C. § 905(a). Moreover, it is only when the employer fails to pay compensation under the Act that the employee can maintain a legal action. (*Id.*) In those circumstances, unlike FELA, the employer may not defend on the basis of the employee's contributory negligence. (*Id.*)

The Federal Employers Liability Act is based on principles entirely different from those which underlie the LHWCA. Under FELA, there can be no recovery unless the employer is at fault. 45 U.S.C. § 51. In addition, contributory negligence on the part of the employee reduces any award. 45 U.S.C. § 53.

The policy of the LHWCA is to provide certain, but fixed, remedies for on-the-job injuries. The advantages of providing appropriate compensation without regard to the fault of the employer have been distinctly recognized by Congress and this Court. *Noguieria, supra,* at 136. The Act itself recognizes that a certain remedy for the employee in exchange for a limitation of liability for the employer is a more appropriate basis for dealing with maritime injuries than under liability acts. The policies inherent in the LHWCA preclude the implication of such an additional remedy against the employer.

II.

WORKERS ENGAGED IN THE REPAIR AND MAINTENANCE OF EQUIPMENT NECESSARY TO SHIPLOADING ARE ENGAGED IN MARITIME EMPLOYMENT WITHIN THE MEANING OF THE LHWCA.

Petitioner concedes that the "situs" requirement for coverage of the LHWCA is satisfied. The occupational or "status" requirement is also satisfied. Because Petitioner's job required him to repair and maintain equipment necessary for shiploading, he was thus engaged within maritime employment within the meaning of 33 U.S.C. § 902(3). The focus of this definition is on the nature of the worker's activity.

> This section defines the Act's occupation requirements. The term "maritime employment" refers to the nature of a worker's activities. Thus section 2(3) uses the phrase "longshoremen or other workers engaged in longshoring operations" as one example of workers who engage in maritime employment no matter where they do their job.

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 78 (1979). Workers responsible for some portion of the land to ship movement of cargo are engaged in "maritime employment."

> Persons moving cargo from ship to land transportation are engaged in maritime employment. A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process.

P.C. Pfeiffer v. Ford, supra, at 82-83. Moreover, the statute and the 1972 amendments are to be liberally construed in

favor of coverage under the Act. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. [illegible], 268 (1977).

In extending coverage of the LHWCA in 1972, Congress recognized that the advent of modern technology had changed the nature of maritime employment. As a consequence of this policy underlying the extension of coverage landward, the federal courts have uniformly held that the repair and maintenance of equipment necessary to shiploading is maritime employment within the meaning of the Act. *See generally, Sealand Services, Inc. v. Director ETC*, 685 F.2d 1121, 1123 (9th Cir. 1982); *Harmon v. Baltimore & Ohio R.R.*, 560 F.Supp. 914, *aff'd* 741 F.2d 1398 (D.C. Cir. 1984).

Petitioner asserts that a more restrictive test for coverage was adopted by this Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). In that case, the Court specifically noted that the claimant's work had nothing to do with the loading or unloading process. *Id.* at 425. In referring to the LHWCA, the Court noted that:

> Its purpose was to cover those workers on the situs who are involved in the essential elements of loading or unloading.

Id. at 423. The context makes it clear that the language merely indicates that involvement with the overall process of loading or unloading is essential, not that occupations less immediately necessary to the loading or unloading process are not covered by the Act.

The maintenance and repair of the sophisticated machinery necessary to load bulk cargo onto vessels at Respondent's shiploading facility is an integral part of the loading process. The development of such modern cargo handling

technology was itself one of the principal reasons for the expansion of coverage under the LHWCA in 1972. Since Petitioner's work in maintaining and repairing this technology was a necessary part of the process of loading vessels, he was engaged in maritime employment within the meaning of the Act.

CONCLUSION

Petitioner's regular employment involved the repair and maintenance of equipment necessary to Respondent's ship-loading operations. He was therefore engaged in maritime employment within the LHWCA in an area used by Respondent for loading vessels. The LHWCA therefore provides coverage for his claimed on-the-job injury and the exclusive liability of his employer. Therefore, Petitioner cannot maintain an action under FELA.

Respectfully submitted,

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